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No._____

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IN THE

Supreme Court of the United States

October Term, 1982

HUDSON FARMS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT**

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QUESTION PRESENTED

Whether live-haul truck drivers and yard personnel are exempt from coverage as agricultural laborers within the meaning of Section 2(3) of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The following listed persons or entities are either parties to or have a pecuniary interest in this proceeding:

Hudson Farms, Inc.
Hudson Foods, Inc. (Parent Corporation)
National Labor Relations Board
General Drivers And Helpers Local No. 823, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

TABLE OF CONTENTS

Question Presented i
Parties To The Proceedings ii
Table of Contents iii
Table of Authorities iv
Opinions Below 1
Jurisdiction 2
Statutory Provisions Involved 2
Statement of The Case 2
Reasons for Granting the Writ 7

I. The Writ Should be Granted to Resolve An Important Question of Federal Law and to End the Conflict Between the Fifth And Eighth Circuits As to The Exempt Status of Live-Haul Drivers And Yard Personnel Under the Fair Labor Standards Act and the National Labor Relations Act Respectively 7

II. The Decision Below is an Erroneous Application of This Court's Decision in *Bayside* 10

Conclusion 21

APPENDIX A

Judgment of the Court of Appeals 1a
Opinion of the Court of Appeals 2a

APPENDIX B

Decision and Order of the National Labor Relations Board 5a
Decision of the Regional Director 16a

APPENDIX C

National Labor Relations Act, 29 U.S.C. §152(3) 34a
Fair Labor Standards Act, 29 U.S.C. §203(f) 23a

TABLE OF AUTHORITIES

CASES:

Arkansas Valley Industries,
167 NLRB 47 (1967) 18

Bayside Enterprises, Inc., v. NLRB,
429 U.S. 298 (1977) ..... *passim*

Bayside Enterprises, Inc.,
216 NLRB 502 (1975) 10

Beth Israel Hospital v. NLRB,
437 U.S. 483 (1978) 19

Coleman v. Sanderson Farms,
629 F.2d 1077 (5th Cir., 1980) .. 8, 14, 16, 17

Fairmont Foods,
81 NLRB 166 (1949) 18

Farmer's Reservior & Irrigation Co., v. McComb,
337 U.S. 755 (1949) 11, 12

Imco Poultry,
202 NLRB 259 (1973) 10

Lindstrom Hatchery,
49 NLRB 776 (1943) 18

Lorenz Schneider Co. v. NLRB,
517 F.2d 445 (2nd Cir., 1975) 20

National Broiler Marketing Association v. U.S.
436 U.S. 816 (1978) 7

NLRB v. Strain Poultry Farms, Inc.,
405 F.2d 1025 (5th Cir., 1969) 15, 16

NLRB v. Victor Ryckebosch, Inc.,
471 F.2d 20 (9th Cir., 1972) 15

NLRB v. Yeshiva University,
434 U.S. 672 (1980) 19, 20

OLAA Sugar Co., Ltd.,
118 NLRB 1442 (1957) 9

TABLE OF AUTHORITIES
(Continued)

CASES:

Strain Poultry Farms, Inc.,
160 NLRB 236 (1966) 10

Valmac Industries,
237 NLRB 992 (1978) 10

Victor Ryckebosch, Inc.,
189 NLRB 502 (1975) 10

STATUTES:

29 U.S.C. §1254(1) 2
29 U.S.C. §152(3) 2, 5, 8
29 U.S.C. §158(a)(1) 5
29 U.S.C. §158(a)(5) 5
29 U.S.C. §160(e) 6
29 U.S.C. §203(f) 2, 5, 8, 17, 19
60 Stat. 698 8
87 Stat. 763 8
92 Stat. 1587 8
94 Stat. 3166 8

MISCELLANEOUS:

The Broiler Industry, an Economic Study of Structure and Problems,
U.S. Department of Agriculture (1971) .. 7

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Hudson Farms, Inc., prays that a Writ of Certiorari issue to review the Decision and Order of the United States Court of Appeals for the Eighth Circuit enforcing an Order of the National Labor Relations Board (hereinafter the "Board").

OPINIONS BELOW

The Opinion issued by the Court of Appeals on July 1, 1982 is reported at —F.2d—, 110 LRRM 2969 (8th

Cir., 1982), and is reproduced in Appendix A of this Petition. The Decision and Order of the National Labor Relations Board, 258 NLRB NO. 49, rendered on September 30, 1981, is unofficially reported at 108 LRRM 1239 and is reproduced in Appendix B.

JURISDICTION

The Order of the United States Court of Appeals for the Eighth Circuit enforcing the Board's Order was entered on July 1, 1982. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. §152(3) and The Fair Labor Standards Act (hereinafter "FLSA"), 29 U.S.C. §203(f) are set forth in Appendix C.

STATEMENT OF THE CASE

Hudson Farms, Inc., (hereinafter "Hudson Farms"), a vertically integrated poultry producer is a wholly owned subsidiary of Hudson Foods, Inc., and is engaged in the raising of broilers (Tr. 16, 45).[1] In this regard Hudson Farms must perform a number of tasks, each involved in the broiler life cycle.

Hudson Farms purchases one-day-old breeding stock from outside suppliers (Tr. 46-47) who deliver the breeding stock (pullets) to independent pullet growers who are under contract with Hudson Farms to feed the pullets for approximately 20 weeks until they reach

[1] "Tr." refers to the original reported transcript before the Board.

egg producing age (Tr. 16, 17, 19). Hudson Farms provides the pullet growers with feed, medication and service personnel (Tr. 17). Once the pullets reach egg producing age they are transferred to breeding and laying facilities where they produce hatching eggs (Tr. 17, 19).

The eggs produced by the breeding flock are transported on Hudson Farms' trucks to egg hatcheries also owned by Hudson Farms (Tr. 18). The eggs hatch after approximately three weeks, and the baby chicks are then debeaked and vaccinated at the hatchery (Tr. 18, 19). The chicks are then transported by Hudson Farms hatchery employees to independent contract growers where the birds are grown for approximately seven and one-half weeks (Tr. 20).

These independent contract growers are under contract with Hudson Farms to provide land, buildings, utilities and labor in order for Hudson Farms' chickens, or broilers, to grow to market weight (Tr. 30). In exchange, Hudson Farms agrees to pay the grower a set rate per pound of broiler growth produced (Tr. 25-27, 42). Hudson Farms specifies and supplies to the grower the type medication and feed it desires its broilers to be fed. Hudson Farms also provides certain standards which the growers must maintain. For example, Hudson Farms specifies the type of equipment the grower must provide, the temperature to be maintained in the buildings and the type and amount of ventilation (Tr. 30). Hudson Farms' broiler supervisors visit the growers at least once a week to be sure that the growers properly perform their jobs, and to handle any problems the growers might have (Tr. 30, 31, 51).

During the broilers' stay at the grower's farm, own-

ership of the broilers remains with Hudson Farms (Tr. 25). The market risk inherent in the broiler industry is borne exclusively by Hudson Farms, not the independent contract growers. For example, the price which Hudson Farms obtains for its broilers can fluctuate five to seven cents per pound in a week (Tr. 33, 35). While the price Hudson Farms receives for the broilers may be fluctuating, its cost of producing those broilers may also change. The major expense of Hudson Farms in producing a broiler is the cost of feed. The major ingredient, corn, has doubled in price in the past two years (Tr. 35). Thus, while the grower's income remains relatively stable, any market risk in producing the broilers remains with Hudson Farms.

When the broilers have grown to market weight (approximately four pounds), Hudson Farms' employees, known as chicken catchers, go to the growers' farms, catch and coop the broilers, and load the cooped birds on live-haul trucks belonging to Hudson Farms and driven by Hudson Farms' live-haul drivers, the workers involved in this case (Tr. 22). The broilers are then delivered to the Hudson Farms live-haul truck lot, a receiving area which is located in Noel, Missouri adjacent to a poultry processing plant operated by Hudson Foods, Inc. (Tr. 22). Hudson Farms pays Hudson Foods, Inc. a fee for processing its broilers, and Hudson Farms then sells the processed broilers (Tr. 27).

In December, 1980, General Drivers & Helpers, Local 823, affiliated with the International Brotherhood of Teamsters (hereinafter the "Union"), petitioned for a Board supervised election among a unit of Hudson Farms' live-haul drivers and yard employees operating out of Noel, Missouri. The live-haul drivers in issue

transport the cooped Hudson Farms' live broilers from the growers' farms to the Hudson Farms' receiving facility. The yard employees shuttle the trucks loaded with the cooped birds from the receiving facility to the Hudson Foods, Inc. processing plant, as needed.

A representation hearing was held on the Union's petition for an election. At the hearing Hudson Farms contended that the petition should be dismissed since the live-haul drivers and yard personnel were agricultural laborers within the meaning of Section 2(3) of the NLRA as defined by Section 3(f) of the FLSA, 29 U.S.C. §203(f). The live-haul drivers and yard personnel, if agricultural laborers, would not be "employees" within the meaning of Section 2(3) of the NLRA.

The Board's Regional Director found that the live-haul drivers and yard personnel were employees under Section 2(3) of the NLRA and not agricultural laborers (App. B at 17a). As employees, the Regional Director ruled that they would constitute an appropriate bargaining unit and directed a Board election in that unit (App. B at 20a).

Hudson Farms timely requested review of the Regional Director's decision and the Board affirmed the Regional Director's decision and direction of an election. The Union won the election and was certified by the Board. Hudson Farms then refused to bargain with the Union, contesting the validity of the certification. The Board, upon charges filed by the Union, reasserted its findings that Hudson Farms' live-haul drivers and yard personnel were employees constituting an appropriate unit for the purposes of collective bargaining and found that Hudson Farms had violated Section 8(a)(5) and (1) of the NLRA by not bargain-

ing with the Union (App. B at 12a) and issued a bargaining order (App. B at 14a).

The Court of Appeals for the Eighth Circuit, acting upon the petition of the Board pursuant to Section 10(e) of the NLRA, granted enforcement of the Board's bargaining order (App. A at 4a).

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW AND TO END THE CONFLICT BETWEEN THE FIFTH AND EIGHTH CIRCUITS AS TO THE EXEMPT STATUS OF LIVE-HAUL DRIVERS AND YARD PERSONNEL UNDER THE FAIR LABOR STANDARDS ACT AND THE NATIONAL LABOR RELATIONS ACT RESPECTIVELY.

The poultry industry in general and vertically integrated poultry producers in particular affected by this case are of vital importance to the national economy. The vertically integrated company has developed into the only significant producer of poultry. More than ninety-five percent of the broilers produced are attributable to vertically integrated companies.[2] The importance of issues affecting this industry has been further highlighted in that this Court has granted certiorari to consider other issues arising out of the poultry industry on two recent occasions.[3] For this reason the present conflict concerning the scope of agricultural exemption existing between the Eighth and Fifth Circuits and, in a greater sense, between the NLRA and the FLSA, must be resolved by this Court.

This case, on petition for Writ of Certiorari from a decision of the Eighth Circuit Court of Appeals, has

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[2] **The Broiler Industry: An Economical Study of Structure, Practices and Problems,** U.S. Department of Agriculture (1971).

[3] **National Broiler Marketing Association v. U.S.,** 436 U.S. 816 (1978); **Bayside Enterprises, Inc. v. NLRB,** 429 U.S. 298 (1977).

created a significant conflict among two circuits as to the scope of the agricultural exemption under the FLSA and the NLRA.[4] As this Court has perceived from earlier segments of this petition, the Eighth Circuit has approved the Board's rigid decision that once an integrated poultry producer such as Hudson Farms has given up temporary custody of its product, broilers, its live-haul drivers and yardmen cannot be considered exempt agricultural employees under Sec. 2(3) of the NLRA.

The foregoing decision of the Eighth Circuit is in direct conflict with a decision by the Fifth Circuit Court of Appeals in an almost identical factual context[5] construing the agricultural exemption under the FLSA in the case of *Coleman v. Sanderson Farms*, 629 F.2d 1077 (5th Cir., 1980). While it is immediately apparent that these conflicting decisions arise under different Acts, the conflict created is highly undesirable and requires prompt resolution in this Court.

Since 1946 the Congress has attached riders to the National Labor Relations Board's Appropriation Acts providing that the term "agricultural laborer" under Section 2(3) of the NLRA shall be defined in accordance with Section 3(f) of the FLSA.[6] As alluded to

[4] 29 U.S.C. §203 and 29 U.S.C. §152.

[5] The Fifth Circuit ruled that live-haul drivers, the same group of employees involved in the instant case, were exempt as agricultural employees under the Fair Labor Standards Act, 29 U.S.C. §203. Live-haul drivers transport live poultry from employers' farms. In both cases the live-haul drivers transported the poultry to what are referred to in the poultry industry as cooling sheds, a place to temporarily hold live poultry. Additionally, in **Sanderson Farms, infra.**, the live-haul drivers also transported the poultry directly to a processing facility.

[6] 60 Stat. 698; 87 Stat. 763; 92 Stat. 1587; 94 Stat. 3166.

earlier, the Board's Order in this case as enforced by the Eighth Circuit creates a situation where employees performing practically identical tasks are treated differently under the same statutory language.

The Congress, in adopting the agricultural exemption from the FLSA, obviously intended the scope of the exemption under the two Acts to be identical. Otherwise, Congress would have drafted totally new language or adopted the language from some other statute. The Board, itself, has recognized the desirability of maintaining uniformity of interpretation between the two Acts. *OLAA Sugar Co., Ltd.*, 118 NLRB 1442 (1957). The Board summarized in *OLAA* the considerations why it is important for this Court to resolve the existing conflict. The considerations of comity among agencies, uniformity in statutory construction and maintenance of a consistent labor policy were touched on by the Board. In *OLAA*, the Board deferred to the position established under the FLSA for the considerations referred to above. In addition, the Board acknowledged that an interpretation under the FLSA should be afforded respect, noting that Congress had singled out the FLSA to be a guide to interpretation of the agricultural exemption under the NLRA.

The Board, it would appear, is now content to no longer attune its decisions to the teachings of cases arising under the FLSA. Indeed, in the case at bar, the Board, supported by the Eighth Circuit, has seen fit to abandon the approach exposed by *OLAA* in favor of a policy of confrontation whenever its reasoning is challenged. Notwithstanding this, the considerations underlying *OLAA* are no less important or forceful today, and require resolution of the conflict by this Court.

II. THE DECISION BELOW IS AN ERRONEOUS APPLICATION OF THIS COURT'S DECISION IN *BAYSIDE*.

In determining whether an individual is an agricultural laborer and, therefore, exempt from coverage under the NLRA, Congress has designated the definition of agriculture to be the same as that promulgated in the FLSA. The Board, however, through some misconception of its own administrative expertise and the deference to be afforded its decisions, has created its own definition of agriculture, spawning different treatment among the two Acts for employees performing the same duties under identical statutory language. In support of this position the Board has erroneously cited this Court's decision in *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 398 (1977).

In this case, the Board, supported by the Eighth Circuit in its decision, has once again restated its adherence to the proposition that a vertically integrated poultry producer irrevocably loses farmer status after it places broilers with an independent contract grower, irrespective of the nature of the integrated producer's operation following such placement.[7] The Board, in support of this position, merely recites this Court's decision in *Bayside*.[8] This artificial cut-off point can-

[7] The Board has asserted this position through a series of cases:
Strain Poultry Farms, Inc., 160 NLRB 236 (1966);
Victor Ryckebosch, Inc., 189 NLRB 40 (1971);
IMCO Poultry, 202 NLRB 259 (1973);
Bayside Enterprises, Inc., 216 NLRB 502 (1975);
Valmac Industries, 237 NLRB 992 (1978).

[8] This Court, in footnote 9 in **Bayside Enterprises v. NLRB, supra**, at 302 noted the Board's position on the farmer status of an integrated poultry producer quoting from the Board's decision in **IMCO Poultry, supra.**

not be supported by a careful reading of the *Bayside* decision.

In *Bayside*, this Court was presented with a fact situation different in one material detail from this case — a detail which cannot be overlooked. The truck drivers in *Bayside* transported feed, an inanimate object, which was the product of a feed mill, a non-farm related enterprise. The drivers in the instant case were transporting raising if you will, a specifically covered agricultural commodity, broilers. On the surface, this appears to be a somewhat fine distinction. However, after scrutinizing the Board's position in *Bayside*, this distinction is appropriate.

The appellants in *Bayside* argued that most all operations of a vertically integrated poultry producer should be considered exempt. The argument was premised on the economic realities involved in broiler production. A vertically integrated poultry producer is one hundred percent at risk throughout the entire life cycle of the poultry, since the Company never relinquishes ownership of the birds. A typical vertically integrated producer has total control over all decisions regarding the care, medication, feeding and husbandry of the broilers. For these reasons, which are equally present in the instant case, the appellant in *Bayside* vigorously argued it should be afforded farmer status throughout the production cycle. Thus, all its workers would be considered exempt for the purposes of the NLRA. The Board successfully argued for, and this Court adopted in *Bayside*, an approach by which each activity of the employer is examined separately to determine whether the employer is engaged in farming in either its primary or secondary sense. *Farmer's Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755

(1949).[9] This Court, acknowledging the deference it extends to Board factual findings, found the activities of *feed* truck drivers to be incidental to Bayside's feed-mill operation rather than incidental to the care of the broilers in the possession of the independent growers. In rejecting an across-the-board approach advocated by the employer in *Bayside*, this Court adopted the Board's position that each case stands on its own as it relates to a determination of whether the activity in which the employer engages is susceptible to the agricultural exemption.[10] One would surmise that the Board, having won its battle in *Bayside*, would adhere to its tenants and analyze each activity performed by an employer separately. This, however, has not been the case.

The Board has ignored the clear teaching of *Bay-*

[9] In **Farmer's Reservoir & Irrigation Co. v. McComb**, this Court recognized that the definition of agriculture under Sec. 3(f) of the Fair Labor Standards Act has two branches:

"First, there is the primary meaning. Agriculture includes farming in all its branches . . . cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." **Id.** at 762-763.

[10] In **Bayside, supra.**, this Court even hinted that some operations of an independent grower, in the Court's language a contract farm, might be considered as susceptible for the exemption:

"Even if we should regard a **contract farm** as a hybrid operation where some of the agricultural activity is performed by **Bayside** and some by the owner of the farm. . . ." **Id.** at 303, [Emphasis Added].

side, and now argues that this Court has unconditionally approved the Board's conclusion that, in all cases, once a vertically integrated poultry producer gives up temporary possession of the broilers to the independent growers, it loses forever farmer status as to those broilers. This conclusion by the Board, approved by the Eighth Circuit's decision in this case, cannot be supported. If *Bayside* stands for anything, it stands for the proposition that the factual background surrounding the operation of an employer is ultimately determinative of whether the agricultural exemption is available. In *Bayside,* this Court went to considerable lengths to comment upon the respect it extends to *reasonable factual determinations* made by the Board on a case by case basis as opposed to *any* inflexible industrywide request for exemption. In establishing this arbitrary line, the Board has, in effect, adopted a position diametrically opposed to the position it advocated in *Bayside* and the approach this Court adopted. As observed earlier, the Board, in defense of this turnaround, has cited footnote 9 in *Bayside* in which this Court quoted the Board's position on this matter. This footnote can best be characterized as merely a recitation of the Board's position by this Court. This footnote cannot be construed as an adoption of such an inflexible rule when the entire thrust of the *Bayside* opinion centers on individual analysis of each activity of an employer to glean whether the agricultural exemption is proper for each group of workers.

In keeping with the case by case approach dictated by *Bayside,* we must analyze the activities of the petitioner. This analysis leads to the inescapable conclusion that the agricultural exemption for the workers involved is appropriate in this case. As was revealed

in an earlier portion of this petition, the individuals involved in this litigation are Hudson Farms' workers who pick up broilers from the independent growers and transport the *live* broilers to the live-haul truck lot. The important facet present here, from the perspective of attempting to apply the agricultural exemption, is the undeniable fact that when Hudson Farms picks up its broilers it is performing functions normally associated with farming. Having once again resumed full control over the care and well being of the broilers, Hudson Farms has responsibility over all functions which relate to their well-being. The husbandry of the birds is once again solely in the hands of Hudson Farms. The decision of the Board, while paying lip service to the facts surrounding the farming functions performed by Hudson Farms, totally ignores the agricultural significance of the duties of these workers in particular, and the agricultural mission of the entire Hudson Farms operation in general. This failure by the Board, as adopted by the Eighth Circuit's decision, directly runs afoul of this Court's recognition in *Bayside* that an integrated poultry producer will have some aspects of its operation which are suitable for the exemption and some which are not:

> "An employer's business may include both agricultural and non-agricultural activities . . . In this case, both parties agree that some of *Bayside's* operations are agricultural and some are not." *Bayside, supra.* at 301.

Petitioner submits the correct approach in assessing the appropriateness of applying the agricultural exemption to employees performing duties almost identical to those performed in the case at bar was developed by the Fifth Circuit in *Coleman v. Sanderson Farms,* 629 F.2d 1077 (1980). In this case the plaintiff's loader

operators and live-haul drivers brought suit to recover overtime compensation alleged to be due them from the defendant, Sanderson Farms, Inc. Sanderson Farms' operations are typical of most vertically integrated producers and the petitioner's Hudson Farms. Sanderson Farms hatched all its broilers in company owned hatcheries from eggs produced by its own breeder flocks. After vaccinating and debeaking the broiler chicks, the company delivered them to independent contract farms where they were raised to market age and size. As in this case, Sanderson Farms was responsible for all the important decisions involving the broilers. Sanderson Farms assumed all the risks, supplied the food, medicine and supplies for the care of the broilers. Sanderson Farms' personnel made routine visits to the independent contract farms to consult with and inspect the broilers while they were in the hands of the independent grower. After the broilers reached market size and weight, they were picked up by Sanderson Farms' employees. It was the live-haul drivers and coop loaders who brought the action against Sanderson Farms for overtime.

Sanderson Farms maintained that these employees were exempt as agricultural employees. The District Court and Fifth Circuit Court of Appeals agreed. The plaintiffs argued that the District Court erred in applying the logic expressed in *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir., 1969) to their case,[11] since in plaintiff's opinion *Strain* had been over-

[11] The decisions in **NLRB v. Strain Poultry Farms, Inc.**, 405 F.2d 1025 (5th Cir., 1969) and **NLRB v. Victor Ryckebosch, Inc.**, 471 F.2d 20 (9th Cir., 1972), were the primary basis for the argument that all the farming activities of the independent grower could be attributed to the vertically integrated poultry producer to afford all its employees

ruled by this Court in *Bayside*. The Fifth Circuit declined to adopt the argument of the plaintiffs, insisting that its decision in *Strain* was sound. In defense of its decision in *Strain* the Fifth Circuit first observed the strong factual distinction existing between the *Strain* and *Sanderson* cases on the one hand and *Bayside* on the other hand. *Strain* and *Sanderson* involved live-haul drivers while *Bayside* considered feed truck drivers. The significance attached to this distinction by the Fifth Circuit, involved the realization that in *Strain* and *Sanderson* the drivers are actually concerned with the care and custody of the broilers, the type of activity normally attributable to the farmer, while in *Bayside* the workers were merely hauling feed, a function which may or may not be performed by a farmer.

Most pursuasive was the Fifth Circuit's application of *Bayside* as a precedent for its position in *Sanderson*. The Court in *Sanderson* observed that *Bayside* recognized that some of the activities of an employer might be considered agricultural and some non-agricultural. In addition, the Fifth Circuit in *Sanderson* identified the following passage in *Bayside* as the turning point in all of these cases; whether an employee is exempt in the area of secondary or incidental farming activities depends upon the character of their employer's activities when the work is not performed on a farm.

> "Since there is no claim that these drivers worked 'on a farm' the question is whether their activity should be regarded as work performed 'by a farmer.' The answer depends on the character of their employer's activities." *Bayside, supra.*, at 301.

The Court, in *Sanderson*, then analyzed the activities

exempt status. As noted earlier, this Court in Bayside rejected this comprehensive approach.

of the employer as they related to the work performed by the employees in question. The Court naturally came to the conclusion that the transportation of broilers to market was in conjunction with the employer's ultimate aim — the production of an agricultural product, live broilers for market. This conclusion was further supported by the FLSA itself which specifically states that employees engaged in "preparation for market" and "delivery to storage or to market", 29 U.S.C. §203(f) are exempt since they are activities "incidental to any farming enterprise", *Id.* at 1081. This perceptive reading of *Bayside* by the Fifth Circuit is equally beneficial in this case, since the employees involved in the case at bar are performing the same functions.

Only a forced and constricted reading of *Bayside* would yield the result advanced by the Board and confirmed by the Eighth Circuit. The artificial line drawn by the Board at a point when a vertically integrated poultry producer places the broiler chicks with the independent grower is not reasonable when the realities of the modern poultry farmer are examined. This Court's ruling in *Bayside* that the farming activities of the independent grower cannot be attributed to the vertically integrated poultry producer to *expand* the scope of the exemption, did not restrict or limit the applicability of the exemption for *farming* activities performed by the vertically integrated poultry producer.[12] Rejection of an expanded interpretation of

[12] This Court in **Bayside** did not purport to limit the availability of the agricultural exemption as it applies to an employer's farming activities. The following language from **Bayside** makes this point clear:

"An employer's business may include both agricultural and non-agricultural activities." **Bayside, supra.** at 301.

the agricultural exemption does not automatically translate into a construction which would judicially repeal the exemption as it applies to existing farming activities. The line drawn by the Board in the instant case, however, seeks to accomplish this very result.

At no time has the Board given serious consideration to the simple fact that care administered to the birds by the live-haul drivers and yard personnel is no less vital to the overall goal of producing a marketable agricultural commodity than the care given by the hatchery personnel which the Board has consistently deemed exempt. *Lindstrom Hatchery*, 49 NLRB 776 (1943); *Fairmont Foods*, 81 NLRB 166 (1949); *Arkansas Valley Industries*, 167 NLRB 47 (1967). The notion that farmer status is lost once birds are temporarily placed in the hands of an independent grower apparently springs from the misconception that all farming activities of the vertically integrated poultry producer ends at this point. From whence the Board's wisdom leads it to such a conclusion concerning the husbandry of poultry is not explored in any of its decisions. The clear fact remains, however, that this rule ignores the undisputed fact that the care of the live poultry is totally within the hands of the live-haul drivers when they take possession from the independent grower. This rule equally ignores the realization that a line cannot be drawn arbitrarily at one point in the production cycle of poultry for the purpose of either irrevocably applying or not applying the agricultural exemption. Such an all or nothing scheme was rejected by this Court in *Bayside*.

It is a logical conclusion that, since the raising of poultry is specifically mentioned as being an agricultural pursuit deserving of the exemption, during every

stage of the poultry production cycle some entity involved in the raising of the broilers must be considered a farmer and may avail itself of the exemption. Query, under the Board's approach, who is the farmer with respect to the birds after the grow-out phase is completed and the poultry is ready for transport? The independent grower, having completed his function, is no longer involved and cannot be the farmer. The Board rejects the proposition that the vertically integrated producer is the farmer, even though he owns the birds and is totally at risk should they not be cared for after leaving the independent grower's facility. The only conclusion left is that the Board obviously believes that no one is a farmer at this critical juncture. In adopting this approach, the Board has repealed the agricultural exemption as it relates to delivery to market, an activity specifically covered under the Statute, 29 U.S.C. §203 (f). Only Congress, is vested with the authority to limit the exemption in this fashion. The Board's position as sustained by the Eighth Circuit is, therefore, not faithful to the NLRA and must be reversed.

To sustain this arbitrary cut-off point, the Board has also argued that its decision concerning its jurisdiction must be adhered to by the Courts. It is without question that the Board's determination concerning its jurisdiction is sustainable if reasonable and faithful to the NLRA. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). The Board's judgment in such matters, however, is not infallible. *NLRB v. Yeshiva University*, 434 U.S. 672 (1980). Courts have in the past and must continue in the future to examine the record of administrative proceedings to determine if justification is present for the assertion of jurisdiction by an administrative agency.

The position of the Board here cannot be supported by the record. Extensive evidence was produced as to the character of the farming activities performed by Hudson Farms, including its hatchery operation (Tr. 18). The Board's arbitrary cut-off point as applied to the facts in this case is no less of an attempt to apply a conclusionary rationale developed in earlier Board decisions as was the case in *Yeshiva*. This Court has specifically condemned this type of decision. A decision resting on such an infirm foundation is clearly subject to review and does not deserve the respect normally accorded Board jurisdictional decisions. As Judge Friendly observed in an independent contractor exemption context in *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, (2nd Cir. 1975), the Congress intended the Courts to review decisions concerning asserted Board jurisdiction and not merely bow to the purported expertise of the Board:

> "The legislative history of the Taft-Hartley Act reveals a clear desire on the part of Congress to restrain the tendency of the courts . . . to bow to the supposed expertness of the Board in its assessment whether a particular group of employees should be considered employees for the purposes of Sec. 2(3) of the National Labor Relations Act, 39 Stat. 449, 450 (1935). SEE H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947), reprinted in 1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 309 (1948)...." *Id.* at n. 1, 446.

The Board's self-serving use of this Court's deference to its decisions forms the only real basis for affirming the result in this case. After considering the Board's decision affirmed by the Eighth Circuit, this Court must decline the invitation of the Board and the Eighth Circuit to abandon meaningful review based on some theory of weight, deference or special expertise to be

bestowed on Board jurisdictional decisions. A meaningful review of this case, in petitioner's belief, can only lead to a finding of error in the Board's position as sustained by the Eighth Circuit.

CONCLUSION

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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